

Moreover, 95% of violations cited do not meet any version of the NESC, the standard that they seek to have apply.^{630]}

382. The EAI Pole Agreements contain construction standards that exceed the NESC requirements and standard industry practices.⁶³¹ [EAI cannot stipulate to this statement as it disagrees with the characterization of EAI's standards as in excess of the NESC. As explained elsewhere, EAI's standards comport with the basic requirements of the NESC, but do not utilize a number of complex exceptions to these rules.^{632]}

383. The terms referenced in (i) above either (a) were not in earlier agreements with EAI, under which the vast majority of the Complainants' Service Area plant was constructed, or (b) existed in the agreements, but EAI did not require the cable operators to adhere to them.⁶³³ [EAI cannot stipulate to any statement in this section. Each assertion is repetitive of assertions made elsewhere and are addressed elsewhere by EAI.^{634]}

⁶³⁰ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

⁶³¹ Harrelson Declaration; Harrelson Reply Declaration

⁶³² Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-14 ("Utilities, therefore, as a practice, design facilities on poles, including initial clearances for lines and communications cables, using standards which exceed the NESC..."); Buie Decl. Resp. Ex 4 at ¶¶ 25-28, 63, 84; Jackson Decl. Resp. Ex. 10 at ¶¶ 5-7 (survey of practices of SEE member utilities); Letter from UTC/EEI to W. Darling, Resp. Ex. 81.

⁶³³ Declaration of Marc Billingsley (Compl. Exh. 6); Declaration of Bennett Hooks (Compl. Exh. 4); Declaration of Jeff Gould (Compl. Exh. 3); Declaration of Charlotte Dial (Compl. Exh. 5).

⁶³⁴ See, Section IV.A.2, *supra*.

384. The NESC explains that heightened standards do not increase safety.⁶³⁵

385. EAI has failed to justify its heightened standards by showing how they increase reliability or promote generally applicable engineering purposes.⁶³⁶

386. EAI's construction crews do not comply strictly with the engineering standards with which EAI requires Complainants to comply strictly as a condition of access.⁶³⁷

387. EAI does not have a clear, consistent set of standards.⁶³⁸

388. The standards used to identify safety violations vary between EAI and USS.⁶³⁹

389. EAI field personnel, with whom complainants have a long history in the field, often grant oral approvals, waivers and variations.⁶⁴⁰

b) EAI

390. EAI has always required adherence to its contract standards.⁶⁴¹

In any event, EAI would not, and could not, have endorsed a condition that

⁶³⁵ Harrelson Reply Report ¶¶ 49-50

⁶³⁶ (See Response Sec. V.B.)

⁶³⁷ Harrelson Report pp. 3, 11-12, 20, 24 (See Complaint Sec. VIII.C.). Harrelson Reply Report p. 38, 40, 44-62; Gould Reply Decl. ¶¶ 22-24; Billingsley Decl. ¶¶ 23-24, 26-27, 46.

⁶³⁸ Dunlap Reply Decl. ¶¶ 5-7; Allen Reply Decl. ¶¶ 18-19; Hooks Reply Decl. ¶¶ 16-19; Gould Reply Decl. ¶¶ 17-21, 30; Billingsley Decl. ¶¶ 23-24 (Reply Sec. V.C.).

⁶³⁹ Allen Reply Decl. ¶ 15; Hooks Reply Decl. ¶ 16; Dunlap Reply Decl. ¶¶ 3-6; Gould Reply Decl. ¶ 17-19; Billingsley Reply Decl. ¶¶ 23-24.

⁶⁴⁰ Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Allen Reply Decl., ¶ 19. (See Reply Sec. III.D.2).

did not even comply with the NESC.⁶⁴² 95% of the violations cited are NESC violations, the standard that Complainants argue should apply.⁶⁴³

[Complainants cannot stipulate to these facts for the reasons set forth in their disputed facts section above.]

3. Stipulated Points of Law

391. None.

4. Disputed Points of Law

a) Complainants

392. It is unjust and unreasonable for EAI to hold Complainants to strict compliance with the Pole Attachment Agreements where EAI's past practice has not previously enforced strict compliance.⁶⁴⁴ [EAI cannot stipulate to any statement in this section. Each assertion is repetitive of assertions made elsewhere and are addressed elsewhere by EAI.⁶⁴⁵]

393. It is unjust and unreasonable for EAI to penalize Complainants for conduct consistent with the parties prior practices.⁶⁴⁶

⁶⁴¹ Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15, Attachments A, C; Kelley Decl. Resp. Ex. 11 at ¶¶ 3-5; Willems Decl. Resp. Ex. 10 at ¶ 8.

⁶⁴² Ark. Code. Ann. § 23-2-304

⁶⁴³ Complaint at 84-86 (list items m, o); Arnett Decl. Resp. Ex. 1 at ¶ 23.

⁶⁴⁴ See *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁶⁴⁵ See Section IV.A.2, *supra*.

⁶⁴⁶ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003)

394. It is wholly unreasonable for EAI now to claim that Complainants' conduct, consistent with the parties' prior practices, are evidence of wrong doing or otherwise justify conducting an audit or survey at Complainants' expense.⁶⁴⁷

b) EAI

395. Application of the engineering standards in the Parties' pole attachment agreements was just and reasonable. Complainants' reliance on *Public Service Co. of Colorado* is misplaced, as this case related to counting methodologies for which the Bureau determined the attachers had no prior notice. The Cable Operators have been on notice of these provisions since the inception of their relationships with EAI, and have not provided any documentation as to permitted deviations.⁶⁴⁸ [Complainants cannot stipulate to this paragraph for the reasons set forth above. Complainants disagree that they have not provided documentation as to permitted deviations.⁶⁴⁹]

F. May A Pole Owner Ever Deny Access Under Section 224 (In Response to Staff's Request)

1. Stipulated law

396. None.

⁶⁴⁷ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁶⁴⁸ See, Section IV.A.4, *supra*, and associated record citations.

⁶⁴⁹ See *e.g.*, Dunlap Reply Decl.; Billingsley Reply Decl. ¶¶ 47-52.

2. Disputed law

a) Complainants

397. A pole owner may only deny access for reasons of safety, reliability and generally applicable engineering purposes.⁶⁵⁰ Thus, a pole owner may only deny access under those circumstances where conditions where there are reasons of safety, reliability and generally applicable engineering purposes supporting denial. Complainants find it difficult to conceive of any circumstance where the reasons of safety, reliability and generally applicable engineering purposes could not be rectified through make-ready. Whether a pole owner may deny access will depend on the specific facts of the situation. [EAI cannot stipulate to these statements for the reasons stated below.]

b) EAI

398. EAI believes this question is inappropriate for inclusion in the Joint Statement as EAI understood the staff to be offering this question as an example, but did not necessarily intend for it to be included if the parties did not believe it was a question necessary for the resolution of the pending dispute.

399. Regardless, the statute clearly indicates that a utility may deny access for reasons of insufficient capacity, or for reasons of safety, reliability or generally applicable engineering purposes. The Commission may not

⁶⁵⁰ 47 U.S.C. § 224.

subvert the language of the statute through application of its rules.⁶⁵¹

[Complainants stipulate to the first sentence. Complainants donot agree that the Commission has subverted the language of the statute through application of its rules.]

IX. USS' SURVEY

A. Whether It Is Unjust And Unreasonable For EAI To Design The Survey At Complainants' Expense Without Complainants' Input.

1. Stipulated Facts

400. None.

2. Disputed Facts

a) Complainants

401. It is unjust and unreasonable for EAI to design the survey at Complainants' expense without Complainants' input. [EAI cannot stipulate to any statement in this section. Each assertion is repetitive of assertions made elsewhere and are addressed elsewhere by EAI.⁶⁵²]

402. Complainants were given no advance notice or opportunity to be involved in the selection of USS as the auditor.⁶⁵³

403. Complainants are unable to participate in the inspections in anything other than an observer role.⁶⁵⁴

⁶⁵¹ *Southern Co. v. FCC*, 293 F.3d 1338, 1146-1147 (11th Cir. 2002).

⁶⁵² *See*, Section V.H.2, *supra*.

⁶⁵³ Declaration of Bennett Hooks at ¶ 13 (Exh. 4); Declaration of Charlotte Dial at ¶ 18 (Exh. 3).

b) EAI

404. EAI made the Cable Operators aware of its safety concerns on a number of occasions, including both before initiating the test inspections and before initiating the full safety inspections.⁶⁵⁵ EAI presented the results of the test inspections to each of the Cable Operators and solicited participation from the Cable Operators in the full inspection process. The Cable Operators declined to participate.⁶⁵⁶ [Complainants cannot stipulate to this paragraph for the reasons set forth in their disputed facts section above. Entergy's version of participation is observation only.⁶⁵⁷ Further, USS made clear to Complainants that they had no rights with respect to the inspections.⁶⁵⁸].

405. EAI followed its internal procurement procedures in engaging USS to perform the safety inspections.⁶⁵⁹ USS was the only firm available and sufficiently experienced to handle the proposed job.⁶⁶⁰ USS' hourly rates and equipment charges are comparable with industry rates, are lower than hourly labor rates for EAI employees in comparable positions, and are in

⁶⁵⁴ Harrelson Reply Report ¶ 24; Hooks Reply Dec. ¶ 39; Billingsley Reply Decl. ¶ 57; Dial Reply Decl. ¶ 15.

⁶⁵⁵ Willems Decl. Resp. Ex. 20 at ¶¶ 16-17; Bettis Decl. Resp. Ex. 3 at ¶¶ 14-18; Inman Decl. Resp. Ex. 9 at ¶¶ 9-10; Neumeier Decl. Resp. Ex. 14 at ¶¶ 2021; Comcast Action Plan, Resp. Ex. 21.

⁶⁵⁶ Inman Decl. Resp. Ex. 4 at ¶ 18; Wagoner Decl. Resp. Ex. 18 at ¶¶ 42, 49, 50, 54.

⁶⁵⁷ Harrelson Reply Report ¶ 24; Hooks Reply Dec. ¶ 39; Billingsley Reply Decl. ¶ 57; Dial Reply Decl. ¶ 15.

⁶⁵⁸ Gould Decl. ¶¶ 37-38.

⁶⁵⁹ Inman Decl. Resp. Ex. 9 at ¶¶ 11-12.

⁶⁶⁰ Inman Decl. Resp. Ex. 9 at ¶¶ 11-12.

most instances lower than industry average.⁶⁶¹ [Complainants cannot stipulate to this paragraph.]

3. Stipulated Points of Law

406. None.

4. Disputed Points of Law

a) Complainants

407. EAI's refusal to allow Complainants to participate in the selection of the contractor and EAI's requirement that Complainant pay USS' charges are contrary to the pole attachment agreement.⁶⁶² [EAI cannot stipulate to any statement in this section for the reasons stated below. These points are also repetitive and addressed elsewhere.⁶⁶³]

408. It is unjust and unreasonable for EAI to design an inspection program at Complainants expense without permitting any meaningful participation in design or implementation.⁶⁶⁴

b) EAI

409. EAI invited and encouraged participation by the Cable Operators in the full inspection process. The Cable Operators, however, declined to participate.⁶⁶⁵ It would be inappropriate and inequitable to

⁶⁶¹ Arnett Decl. Resp. Ex. 1 at ¶¶ 10-22 and Attachment A; Bettis Decl. Resp. Ex. 3 at ¶ 19; Inman Decl. Resp. Ex. 9 at ¶ 24; Wagoner Decl. Resp. Ex. 18 at ¶¶ 15-18.

⁶⁶² EAI Pole Agreements at § 7.2 (Exh. 2A-2D).

⁶⁶³ *See, e.g.*, Section V.H.4, *supra*.

⁶⁶⁴ *See Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

⁶⁶⁵ Willems Decl. Resp. Ex. 10 at ¶¶ 16-17; Inman Decl. Resp. ex. 9 at ¶ 8; Wagoner Decl. Resp. Ex. 18 at ¶¶ 42, 49, 50, 54.

reprimand EAI for failing to include attachers where the Cable Operators affirmatively declined to participate. [Complainants cannot stipulate to this paragraph for the reasons set forth in their disputed law section above⁶⁶⁶].

B. Whether EAI Unlawfully Inflated Cable Operator Invoices With “Phantom” Attachments.

1. Stipulated Facts

410. None.

2. Disputed Facts

a) Complainants

411. USS included attachments on SBC poles in its inventory count.⁶⁶⁷ [EAI cannot stipulate to this statement. EAI did not include SBC poles in its count.⁶⁶⁸]

412. The supporting documentation EAI provides is rife with errors. USS’ count includes drop poles.⁶⁶⁹ [EAI cannot stipulate to this statement because it disagrees with the characterization of the documentation as being “rife with errors.” The count includes drop poles, as have previous counts on which Complainants bills have been based.⁶⁷⁰]

⁶⁶⁶ Neither EAI nor USS gave Complainants any real opportunity to participate. *See, e.g.*, Hooks Reply Decl. ¶¶ 31-32; Harrelson Report ¶¶ 24-25.

⁶⁶⁷ Billingsley Decl. ¶¶ 45-47

⁶⁶⁸ Inman Decl. Resp. Ex. 4 at ¶ 42.

⁶⁶⁹ Declaration of Marc Billingsley at ¶ 50 (Exh. 6).

⁶⁷⁰ Bethea Decl. Resp. Ex. 2 at ¶ 6.

413. Comcast and its predecessors have never submitted applications for connections to drop poles.⁶⁷¹ [EAI cannot stipulate to this statement. It is irrelevant to the question as to whether such poles are or have been included in an attachment inventory.]

414. USS counted each attachment bolted to the pole, even where the attachments occupy the same 12 inches of space.⁶⁷² This practice is inconsistent with EAI's own written standard of counting any attachment within 12 inches of one another as a single attachment.⁶⁷³ [EAI cannot stipulate to this or the remaining paragraphs in this section for the reasons cited below.]

415. USS' approach is inconsistent with EAI's policy, resulting in a significant overstatement of billable attachments as well as a substantial improper demand for unauthorized attachment penalties.⁶⁷⁴

b) EAI

416. EAI did not inflate invoices with "phantom attachments." While EAI has not required permits for drop poles, it has counted drop poles in its inventories for rental purposes since 1984.⁶⁷⁵ It has also been EAI's practice to count attachments based on one foot of space on poles. If there are one or more attachments within a space of one foot, then only one attachment is

⁶⁷¹ Billingsley Decl. ¶ 50.

⁶⁷² Billingsley Decl. ¶ 53.

⁶⁷³ See Inman Letter (Compl. Exh. 29).

⁶⁷⁴ Declaration of Marc Billingsley at ¶ 53 (Exh. 6)

⁶⁷⁵ Bethea Decl. Resp. Ex. 2 at ¶ 6.

counted for purposes of billing.⁶⁷⁶ Through-bolts are counted as a separate attachment regardless of whether they are placed within 12 inches of another attachment.⁶⁷⁷ This is because attaching these bolts requires holes to be drilled completely through the pole which compromises the integrity, longevity and strength of the pole, especially if two or more through-bolts are placed within 12 inches or less of one another.⁶⁷⁸ Additionally, EAI's engineering standards incorporated in the pole attachment agreements require these bolts to be spaced 12 inches apart.⁶⁷⁹ [Complainants cannot stipulate to this section for the reasons set forth above.]

3. Stipulated Points of Law

417. None.

4. Disputed Points of Law

a) Complainant

418. It is unjust and unreasonable for EAI to assess retroactive penalties for connections to drop poles where the practice of the parties, as here, had been not to apply for connections to drop poles.⁶⁸⁰ [EAI cannot

⁶⁷⁶ Inman Decl. Resp. Ex. 9 at ¶ 39.

⁶⁷⁷ Inman Decl. Res. Ex. 9 at ¶ 39.

⁶⁷⁸ Inman Decl. Resp. Ex. 9 at ¶ 39.

⁶⁷⁹ Inman Decl. Resp. Ex. 9 at ¶ 39.

⁶⁸⁰ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

stipulate to this statement. Drop poles were included in prior attachment counts as cited above.^{681]}

419. The Commission should direct that at most EAI may require attachment fees for connections to drops on a prospective basis from the date of the Commission's order.⁶⁸² [EAI cannot stipulate to this statement as it is a request for relief and not a statement of law. The facts do not support such a conclusion in any event.]

420. It is unjust and unreasonable for EAI/USS to count every bolted attachment on a pole as a billable attachment.⁶⁸³ [EAI cannot stipulate to this statement for the reasons cited above.]

b) EAI

421. EAI can offer no disputed points of law as the question posed is in the manner of a pure question of fact. EAI's counting methodology, a necessary by-product of the safety inspection process, is lawful and consistent with the parties past practices.⁶⁸⁴ [Complainants cannot stipulate to this. The question is a matter of law as it addresses whether practices were just and reasonable. For the reasons set forth in Complainants' disputed facts section, Complainants cannot stipulate to the 2d sentence.]

⁶⁸¹ Bethea Decl. Resp. Ex. 2 at ¶ 6.

⁶⁸² *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁶⁸³ Inman Letter (Compl. Exh. 29); Billingsley Decl. ¶¶ 50-53.

⁶⁸⁴ Bethea Decl. Resp. Ex. 2.

C. Whether EAI And USS Have Failed To Ensure Quality Control

1. Stipulated Facts

422. None.

2. Disputed Facts

a) Complainants

423. It is unjust and unreasonable for EAI to require Complainants to pay USS' charges because EAI and USS have not taken adequate assurances to ensure that Complainants are not charged for USS' work that is erroneous or inconsistent. [EAI cannot stipulate to any statements in this section for the reasons cited below. EAI and USS have been responsive to errors, and have reviewed invoices and field work for accuracy and consistency.⁶⁸⁵ Complainants' manipulation and misuse of the data provided, however, often resulted in confusion on the part of Complainants.⁶⁸⁶]

424. Complainants have found numerous errors and problems with USS' survey.⁶⁸⁷

425. USS' inspections are inconsistent.⁶⁸⁸

⁶⁸⁵ Welch Decl. Resp. Ex. 19 at ¶¶ 19-22.

⁶⁸⁶ See email message from Romaine McDaniel, Alliance, to John Tabor, USS, dated May 25, 2004, and "Entergy Audit – No Gig Sheets" created by Alliance, Resp. Ex. 70; Tabor Decl. Resp. Ex. 17 at ¶ 29; Wagoner Decl. Resp. Ex. 18 at ¶¶ 19, 36-39; Letter from W. Darling to K. Birch Resp. Ex. 26; Letters from W. Darling to J. Brinker, Resp. Ex. 45; Letter from D. Inman to R. Colvin, Resp. Ex. 24.

⁶⁸⁷ Hooks Decl. ¶¶ 36-38 (Compl. Exh. 4); Billingsley Decl. ¶¶ 38-39, 66-69 (Compl. Exh. 6); Dial Decl. ¶¶ 25-29; Billingsley Reply Decl. ¶¶ 54-55.

426. Complainants derive no benefit from USS' defective inspections and must conduct subsequent audits to verify the information.⁶⁸⁹

b) EAI

427. EAI personnel reviewed bills and USS' field work and only minor discrepancies were noted.⁶⁹⁰ EAI also ensured quality control through review and evaluation of those poles on which USS noted a violation for EAI.⁶⁹¹ USS has its own internal Quality Control process, including the use of quality control inspectors.⁶⁹² USS did not charge for those inspections that did not meet its quality control standards.⁶⁹³ [Complainants cannot stipulate to this paragraph. Complainants do not believe that the inspections met any quality control.⁶⁹⁴ Further, Complainants have not been able to obtain sufficiently detailed documentation of USS charges and therefore do not have any independent knowledge as to whether USS did not charge for defective inspections.⁶⁹⁵ Finally, considering that USS charges by the hour,

⁶⁸⁸ Billingsley Reply Decl., ¶ 55; Hooks Reply Decl., ¶¶ 28, 34; Gould Reply Decl., ¶¶ 35, 40; Billingsley Decl. ¶¶ 66-69; Hooks Decl. ¶¶ 36-38; Billingsley Reply Decl. ¶¶ 54-55.

⁶⁸⁹ Hooks Decl. ¶ 36; Billingsley Decl. ¶ 39;

⁶⁹⁰ Bettis Decl. Resp. Ex. 3 at ¶22; Welch Decl. Resp. Ex. 19 at ¶¶ 19-20.

⁶⁹¹ Bettis Decl. Resp. Ex. 3 at ¶22.

⁶⁹² Arnett Decl. Resp. Ex. 1 at ¶ 9; Wagoner Decl. Resp. Ex. 18 at ¶¶ 19, 36-39.

⁶⁹³ Wagoner Decl. Resp. Ex. 18 at ¶¶ 19, 36-39.

⁶⁹⁴ Billingsley Decl. ¶¶ 66-68; Complaint Sec. VII.B.

⁶⁹⁵ Complaint ¶ 306; Compl. Exhs. 34, 33, 13, 14.

Complainants do not understand how USS backs out its charges for defective work or how USS has any incentive to ensure quality control.^{696]}

428. UCI's review of USS' inspections support the accuracy of the inspection process and the conclusions regarding responsibility for corrections. Of 6,487 USS cited violations for Comcast that were field checked by UCI as of September 2003, Comcast disputed only 516 (8%) of these violations.⁶⁹⁷ Upon further review of 359 of the disputed violations, only 45 were found to have been caused by EAI or another party. Thus, of the 6,487 that UCI double checked, less than 1% were found to have been the responsibility of another entity.⁶⁹⁸ [Complainants cannot stipulate to this paragraph because they disagree with EAI's analysis. Complainants contest the quality of USS' inspection on more bases than just incorrect allocation of fault.^{699]}

3. Stipulated Points of Law

429. "The practices of [the utility] in implementing the terms and conditions of the agreement with [the attacher] must be just and reasonable. [The utility] cannot engage a contractor ...and disregard the cost because [the attacher] is responsible for paying it. Though we do not expect [the utility] to

⁶⁹⁶ Billingsley Reply Decl. ¶ 55; Hooks Reply Decl. ¶ 35; Gould Reply Decl. ¶ 41; Dial Reply Decl. ¶ 17.

⁶⁹⁷ Tabor Decl. Resp. Ex. 17 at ¶ 32.

⁶⁹⁸ Tabor Decl. Resp. Ex. 17 at ¶ 32.

⁶⁹⁹ Harrelson Report ¶¶ 55-63.

negotiate the lowest possible fee, the work should be done at a competitive rate in consonance with the work to be done.”⁷⁰⁰.

4. Disputed Points of Law

a) Complainants

430. It is unjust and unreasonable for EAI to require Complainants to pay for defective or shoddy work.⁷⁰¹

431. It is unjust and unreasonable for EAI to require Complainants to pay for work from which they derive no benefit.⁷⁰² [EAI cannot stipulate to these statements. EAI has not required payment for “shoddy” work, and disagrees with Complainants’ characterization of the work performed. EAI and USS have both exercised review and quality control over the inspection process, as stated herein.⁷⁰³]

432. EAI has an obligation to assure that inspection costs imposed by third party contractors are just and reasonable. EAI may not disregard the reasonableness of USS’ costs simply because it is passing these costs through to the Complainants.⁷⁰⁴ [EAI cannot stipulate to this statement for the reasons stated below.]

⁷⁰⁰ *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

⁷⁰¹ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563, ¶ 23 (2000).

⁷⁰² *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647 (1999); *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610 (1992); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610 (1992).

⁷⁰³ *See, e.g.*, Welch Decl. Resp. Ex. 19 at ¶¶ 19-22; Arnett Decl. Resp. Ex. 1 at ¶ 9; Wagoner Decl. Resp. Ex. 18 at ¶¶ 19, 28-39.

⁷⁰⁴ *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

b) EAI

433. Where an attaching entity is responsible for costs associated with an inspection, such work should be done “at a competitive rate in consonance with the work to be done.”⁷⁰⁵ The utility is not required to engage the contractor with the lowest rate available.⁷⁰⁶ [Complainants stipulate to this principle, however not to the allegation that USS’ work was a competitive rate in consonance with the work to be done. See Section IX.D. below.]

D. Whether The Charges For USS’ Survey Are Just And Reasonable

1. Stipulated Facts

434. None.

2. Disputed Facts

a) Complainants

435. USS’ charges are unjust and unreasonable because they include impermissible cost items, do not itemize all charges and because Complainants do not derive a benefit from USS’ services. [EAI cannot stipulate to this statement. Complainants’ cite no support for the “impermissibility” of these charges. Rather, as cited below, USS charges, both line item and in total, are consistent with industry norms.⁷⁰⁷]

⁷⁰⁵ *Cable Texas v. Entergy Services, Inc.* at ¶ 14.

⁷⁰⁶ *Id.*

⁷⁰⁷ Arnett Decl. Resp. Ex. 1 at Attachment A.

436. EAI charges Complainants for costs associated with USS defending its billing practices and charges.⁷⁰⁸ [EAI cannot stipulate to this statement. Most meetings involved the discussion of engineering issues, with minimal time devoted to billing.⁷⁰⁹]

437. EAI charges Complainants for daily use of equipment, including digital cameras, GPS units, and radios.⁷¹⁰

438. EAI charges Complainants for USS' inspectors mileage charges and personal expenses.⁷¹¹ [With respect to the prior two paragraphs, EAI will stipulate to the following: USS charges for daily use of equipment, including digital cameras, GPS units, and radios. USS charges for some of USS' inspectors' mileage charges and per diem.]

439. EAI's billing documentation does not provide enough detail for Complainants to identify with specificity for what they are being charged.⁷¹² [EAI cannot stipulate to this statement. EAI has provided detailed billing down to the time-entry level.⁷¹³]

⁷⁰⁸ Billingsley Decl. ¶ 64; Alliance Allocation Invoice (Compl. Exh. 33); Hooks Decl. ¶ 35;

⁷⁰⁹ Wagoner Decl. Resp. Ex. 18 at ¶ 16.

⁷¹⁰ Comcast Allocation Invoice (Compl. Exh. 32); Alliance Allocation Invoice (Compl. Exh. 33); WEHCO Allocation Invoice (Compl. Exh. 34).

⁷¹¹ Comcast Allocation Invoice (Compl. Exh. 32); Alliance Allocation Invoice (Compl. Exh. 33); WEHCO Allocation Invoice (Compl. Exh. 34).

⁷¹² Billingsley Decl. ¶ 15-22; Dial Reply Decl. ¶ 16; Billingsley Reply Decl. ¶ 58.

⁷¹³ *See, e.g.*, Letter from W. Darling to K. Birch, Resp. Ex. 26; Letters from W. Darling to J. Brinker, Resp. Ex. 45; Letter from D. Inman to R. Colvin, Resp. Ex. 24.

440. USS' hourly charges are inconsistent with industry standard of per pole charges.⁷¹⁴ [EAI cannot stipulate to this statement. USS' charges are reasonable and within industry norms.⁷¹⁵ Moreover, per pole charges would over-recover for poles that have no violations or are otherwise quick to inspect.]

441. USS has no incentive to ensure quality control or efficiency because it is being paid on an hourly basis.⁷¹⁶ [EAI cannot stipulate to this statement or any remaining statement in this section. This argument was not presented in the Complaint. In any event, USS does not charge for and will not recover for time spent where such work does not meet quality control standards.⁷¹⁷]

442. USS does not purport to find every violation on the poles.⁷¹⁸ [EAI cannot stipulate to the remaining statements in this section. They are also repetitive and addressed elsewhere.⁷¹⁹]

443. USS does not sign off or otherwise provide documentation for poles that it has approved.⁷²⁰

⁷¹⁴ Dial Reply Decl. ¶ 14, 17; Hooks Reply Decl. ¶¶ 29-30; Gould Reply Decl. ¶¶ 41-42; Billingsley Reply Decl. ¶¶ 59-60.

⁷¹⁵ Arnett Decl. Resp. Ex. 1 at Attachment A; Jackson Decl. Resp. Ex. 10.

⁷¹⁶ Dial Reply Decl. ¶¶ 14-15; Hooks Reply Decl. ¶¶ 29-30; Gould Reply Decl. ¶¶ 41-42; Billingsley Reply Decl. ¶¶ 59-60.

⁷¹⁷ Wagoner Decl. Resp. Ex. 18 at ¶ 39.

⁷¹⁸ Allen Reply Decl. ¶ 16; Gould Reply Decl. ¶¶ 35-36; Billingsley Reply Decl. ¶ 61

⁷¹⁹ *See, e.g.*, Sections VII.C.2, V.E, *supra*.

⁷²⁰ Allen Reply Decl. ¶¶ 16-17;

444. Comcast and Cox must hire a second contractor to re-visit poles
USS flags as having a violation and engineer corrections.⁷²¹

b) EAI

445. EAI followed its internal procurement procedures in engaging
USS to perform the safety inspections. USS was the only firm available and
sufficiently experienced to handle the proposed job.⁷²² USS' hourly rates and
equipment charges are comparable with industry rates, are lower than
hourly labor rates for EAI employees in comparable positions, and are in
most instances lower than average.⁷²³ UCI has charged comparable
component rates for hourly work.⁷²⁴ EAI secured rates lower than rates that
USS charged in other geographic areas.⁷²⁵ [Complainants cannot stipulate to
the facts in this paragraph. First, Complainants have no knowledge of EAI's
internal procurement procedures or whether EAI followed them. Second,
Complainants disagree that USS was the only firm available and sufficiently
experienced to handle the job. UCI is currently doing substantially similar
work.⁷²⁶ Third, it is irrelevant to compare hourly rates because the industry

⁷²¹ Billingsley Reply Decl. ¶¶ 62-63; Gould Reply Decl. ¶ 43.

⁷²² Inman Decl. Resp. Ex. 9 at ¶¶ 11-12.

⁷²³ Arnett Decl. Resp. Ex. 1 at ¶¶ 10-22, Attachment A; Bettis Decl. Resp. Ex. 3 at ¶ 19; Inman Decl. Resp. Ex. 9 at ¶ 24; Wagoner Decl. Resp. Ex. 18 at ¶¶ 15-18.

⁷²⁴ Arnett Decl. Resp. Ex. 1 at ¶¶ 14, 40-44; *Knology v. Georgia Power*.

⁷²⁵ Arnett Decl. Resp. Ex. 1 at ¶ 10.

⁷²⁶ See Harrelson Report, pp. 7-8; Harrelson Reply Report; Gould Reply Decl. ¶ 43; Billingsley Reply Decl. ¶¶ 61-63..

standard is to hire contractors on a per pole basis.⁷²⁷ Fourth, Complainants have no knowledge as to whether USS' rates in Arkansas are lower than in other geographic areas, or whether this comparison factored in the transportation and per diem charges EAI passes through to Complainants.]

3. Stipulated Points of Law

446. Where an attaching entity is responsible for costs associated with an inspection, such work should be done "at a competitive rate in consonance with the work to be done."⁷²⁸ The utility is not expected to negotiate the lowest possible fee.⁷²⁹

447. EAI cannot engage a contractor and disregard the costs because the attachers are paying for it.⁷³⁰

4. Disputed Points of Law

a) Complainants

448. It is unjust and unreasonable for EAI to require Complainants to pay for work from which they derive no benefit.⁷³¹ [EAI cannot stipulate to

⁷²⁷ Dial Reply Decl. ¶¶ 14, 17; Hooks Reply Decl. ¶¶ 29-30; Gould Reply Decl. ¶¶ 41-42; Billingsley Reply Decl. ¶¶ 59-60.

⁷²⁸ *Cable Texas v. Entergy Services, Inc.* at ¶ 14.

⁷²⁹ *Id.*

⁷³⁰ *Cable Texas v. Entergy Services, Inc.* at ¶ 14.

⁷³¹ *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647 (1999); *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610 (1992); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610 (1992).

any statements in this section for the reasons cited elsewhere. These statements are repetitive.^{732]}

449. EAI has an obligation to assure that inspection costs imposed by third party contractors are just and reasonable. EAI may not disregard the reasonableness of USS' costs simply because it is passing these costs through to the Complainants.⁷³³

450. It is unjust and unreasonable for EAI to fail to provided detailed billing documentation. ⁷³⁴ [EAI cannot stipulate to this statement. EAI has provided such detail.^{735]}

b) EAI

451. EAI is not required to issue an RFP before engaging a contractor to perform work the costs of which an attacher is responsible for paying, nor is it required to secure inspection services on a per pole pricing basis.

Because EAI used its usual procedures in engaging USS and because USS' hourly and component rates are comparable to others in the market for the work done,⁷³⁶ the charges for the inspection were just and reasonable.

[Complainants cannot stipulate to this paragraph because it largely reiterates the statements of fact to which Complainants have already

⁷³² See, e.g., Sections V.I.2, IX.C.4, *supra*.

⁷³³ *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

⁷³⁴ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563 (2000).

⁷³⁵ See, e.g., Letter from W. Darling to K. Birch, Resp. Ex. 26; Letters from W. Darling .to J. Brinker, Resp. Ex. 45; Letter from D. Inman to R. Colvin, Resp. Ex. 24.

⁷³⁶ Arnett Decl. Resp. Ex. 1 at ¶ 10-22; Inman Decl. Resp. Ex. 9 at ¶¶ 11-12.

objected above. Complainants further state that they cannot stipulate to this paragraph because of the reasons set forth in its disputed law section above.]

E. Was EAI's Inspection And Clean-Up Program Due To Complainants' Plant Conditions Or Other Factors.

1. Stipulated Facts

452. Both EAI's and the Cable Operators' plant were impacted by a severe ice storm in the Winter of 2000.⁷³⁷ The Cable Operators also undertook upgrades to their facilities involving overlash and replacement of active and passive electronics between 1999 and 2002.⁷³⁸ EAI conducted test inspections of the facilities of Comcast, Alliance and WEHCO, and presented the results of these inspections to each company.⁷³⁹ EAI advised Comcast, Alliance, and WEHCO that the results warranted a safety inspection of all of their facilities.

2. Disputed Facts

a) Complainants

453. EAI initiated its inspection and clean-up program for its own benefit--to rehabilitate its plant. Complainants did not cause massive outages and damage to EAI's plant. [EAI cannot stipulate to these statements. Complainants have cited no record evidence. EAI's record evidence is cited below.]

⁷³⁷ Reply p. 23; Bettis Decl. Resp. Ex. 3 at ¶ 13; Neumeier Decl. Resp. Ex. 14 at ¶ 15; Willems Decl. Resp. Ex. 20 at ¶ 12.

⁷³⁸ Carpenter Decl. Resp. Ex. 5. Reply at p. 30.

⁷³⁹ Harrell Decl. Resp. Ex. 8 at ¶ 24.

454. EAI represented to the Arkansas Public Service Commission that it suffered outages and damages due to extreme weather conditions.⁷⁴⁰ The APSC did not permit EAI to recover \$3.8 million of costs associated with the ice storms.⁷⁴¹ [EAI will stipulate to the following: EAI suffered outages and damages due to extreme weather conditions in December 2000. Under the terms of a settlement agreement with the Arkansas Public Service Commission, of the \$195,493,036 that EAI spent in restorations efforts, \$3.8 million was not recovered from Arkansas retail ratepayers. *See, Entergy System Fully Restored Ahead of Projections*, Jan. 3, 2001, <http://www.entergy-arkansas.com/AR/newsroom/newsDetail.asp?ID=112&RC=Ar&List=Region> (visited June 7, 2005); *In The Matter of the Annual Evaluation Reports of Entergy Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002) at Ex. 3.]

455. Two Entergy representatives told five Cox employees that Entergy's principal motive was to upgrade its aerial plant at the expense of

⁷⁴⁰ *See, EAI System Fully Restored Ahead of Projections*, Jan. 3, 2001, <http://www.EAI-arkansas.com/AR/newsroom/newsDetail.asp?ID=112&RC=Ar&List=Region> (visited June 7, 2005); *See In The Matter of the Annual Evaluation Reports of EAI Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), p. 15.

⁷⁴¹ *See In The Matter of the Annual Evaluation Reports of EAI Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), p. 15.

cable operators.⁷⁴² [EAI cannot stipulate to this statement. The persons involved were not Entergy Arkansas employees, but employees of another Entergy subsidiary. These employees also deny making such statements.⁷⁴³ The title of a seminar presentation that was never given is irrelevant.]

456. Complainants did not cause massive outages or damages to EAI's plant.⁷⁴⁴ [EAI cannot stipulate to this statement for the reasons cited below.⁷⁴⁵]

b) EAI

457. This was not a "sham" inspection designed to upgrade EAI's pole plant at the expense of the cable companies as alleged by Complainants.⁷⁴⁶ It was a legitimate response to safety and reliability problems uncovered after a

⁷⁴² Gould Decl. ¶¶ 24-25; Agenda, 2nd Joint Wire & Pole Usage Conference at 5 (Reply Exh. 1).

⁷⁴³ Gramling Decl. Resp. Ex. 7; Stevens Decl. Resp. Ex. 15.

⁷⁴⁴ Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

⁷⁴⁵ *See also*, Resp. Ex. 90-93.

⁷⁴⁶ Gramling Decl. Resp. Ex. 7 at ¶¶ 4-6; Stevens Decl. Resp. Ex. 15 at ¶¶ 4-7; Willems Decl. Resp. Ex. 20 at ¶ 15; Letter from W. Darling to D. Thomas, Resp. Ex. 44.